83-1459

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PIEDMONT PUBLISHING COMPANY, INC., an affiliate of MEDIA GENERAL, INC., and JOE DOSTER, DUDLEY DALTON, JOE GOODMAN, and RAY DOWNEY-LASKOWITZ, Individually, and in their respective capacities as the Publisher, City Editor, Managing Editor, and Photographer of the Winston-Salem Journal and Sentinel,

Petitioners,

v.

ED COCHRAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE
NORTH CAROLINA COURT OF APPEALS

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QUESTION PRESENTED

Whether a state court constitutionally can impose a procedurally stricter standard upon a defendant in a First Amendment case than that which exists for other civil cases and hold, in ruling on a motion for summary judgment, that the case must go to the jury thereby precluding any use of a directed verdict motion?

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption.

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The North Carolina Superior Court's Order is unreported. The North Carolina Court of Appeals' decision is reported as Cochran v. Piedmont Publishing Co., Inc., 62 N.C.App. 548, 302 S.E.2d 903 (1983). The North Carolina Supreme Court's denial of certiorari appears at 310 S.E.2d 348 (1983).

GROUNDS FOR JURISDICTION

The judgment by the North Carolina Supreme Court denying the petition for certiorari was entered on December 6, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Amend. I

U.S. Const. Amend. XIV.

STATEMENT OF THE CASE

Plaintiff filed this lawsuit alleging that a photograph and caption which appeared in the Winston-Salem Journal and Sentinel were defamatory and that he was entitled to punitive damages based on their publication. The photograph is a picture of plaintiff, two other men, and one woman seated on a park bench. Beneath the picture is a caption which reads: "Waiting for Godot. For these people sitting on a bench on Marshall Street much of life seems to be waiting. They are hungry, they say, and are waiting for some money to get something to satisfy their hunger. And tomorrow? That will be a day for more waiting."

Plaintiff contends that he told the photographer that he did not want his name or picture to be published, that the caption is false, and that he thus is entitled to have submitted to a jury a claim for $5,000,000 in punitive damages. Importantly, plaintiff is also seeking the punitive damage award from the Publisher, City Editor, Managing Editor, and Photographer. Defendants contend that plaintiff has not made a sufficient showing of actual malice to allow plaintiff to go to the jury on the issue of punitive damages, as required by the United States Constitution, First and Fourteenth Amendments, and, therefore, plaintiff's request for punitive damages should be denied as a matter of law.

After discovery was completed in this case, defendants filed a motion for summary judgment on whether the publication was defamatory and whether plaintiff was entitled to recover punitive damages. Both parties briefed and argued the constitutional requirement of actual malice that must be present to enable a party to recover punitive damages. The North Carolina Superior Court Judge agreed with defendants and dismissed plaintiff's punitive damages claim pursuant to defendants' summary judgment motion. Plaintiff appealed to the North Carolina Court of Appeals where both parties again briefed and argued the constitutional issue of actual malice. The North Carolina Court of Appeals reversed the decision of the Superior Court Judge and held that the

issue of punitive damages must go to the jury because there was a factual dispute about the falsity of the statements under the caption and because "summary judgment is not favored where proof of actual malice is required of the plaintiff."

Defendants timely petitioned the North Carolina Supreme Court for certiorari. The defendants argued in their petition that the North Carolina Court of Appeals incorrectly applied the constitutional requirement of actual malice when it reversed the trial court's grant of summary judgment on the punitive damage claim. Defendants also argued that the North Carolina Court of Appeals erred by following the rule restricting the instances in which summary judgment may be granted in actual malice cases and by

holding that plaintiff's case must go to the jury. The North Carolina Supreme Court denied defendants' petition for certiorari.

REASONS FOR ALLOWANCE OF THE WRIT

1. This Action Involves Important Questions of Constitutional Law Which Should be Settled by This Court

The question before this Court is whether a state court constitutionally can impose a procedurally stricter standard upon a defendant in a First Amendment case than that which exists for other cases and hold, in ruling on a motion for summary judgment, that the case must go to the jury thereby precluding any use of a directed verdict motion. The North Carolina Court of Appeals continues to

follow language from one of its prior decisions, in which the court stated "we do not think [actual malice is] an appropriate issue for summary judgment where defendant has the burden of showing the absence of an issue of actual malice." Hall v. Piedmont Publishing Co., 46 N.C.App. 760, 266 S.E.2d 397 (1980). In this case the North Carolina Court of Appeals goes so far as to "hold that the issue of punitive damages should be submitted to the jury." Thus, the North Carolina Court of Appeals, without knowing what the evidence will be at trial, has not only incorrectly reversed the entry of summary judgment and misinterpreted and misapplied the constitutional requirement of actual malice but also has incorrectly precluded defendants from any use of a

directed verdict motion at trial. No matter what the evidence at trial is in this case, according to the North Carolina Court of Appeals' holding, the issue of punitive damages must be submitted to the jury.

The standard adopted by the North Carolina Court of Appeals is an interpretation of dicta from a footnote in the United States Supreme Court's decision in Hutchinson v. Proxmire, 443 U.S. 111 (1979). Prior to Hutchinson many courts had held that summary judgment on the issue of actual malice was preferred in an attempt to discourage the "chilling effect" that libel suits have on the media. This Court, however, expressed doubt about the validity of that presumption in Hutchinson, 443 U.S. at 120 n. 9.

Now the courts are divided about the standard to apply in actual malice cases.

A number of courts have held, contrary to the North Carolina Court of Appeals' Cochran holding, "that the standard of review in First Amendment defamation actions, as in all summary judgment cases, is whether the record, construed in a light most favorable to the party against whom the judgment has been entered, demonstrates there are genuine issues of fact which, if proven, would support a jury verdict for that party." Rebozo v. Washington Post Co., 637 F.2d 375, 381 (5th Cir.) cert. denied, 454 U.S. 964 (1981); Schultz v. Newsweek, Inc., 668 F.2d 911 (6th Cir. 1982) (no rule favors either granting or denying summary judgment); Bon Air Hotel, Inc. v. Time, Inc.,

426 F.2d 858, 865 (5th Cir. 1970) ("Thus it is clear that, where a publication is protected by the New York Times immunity rule, summary judgment, rather than trial on the merits, is a proper vehicle for affording constitutional protection in the proper case"). Other courts, however, have held that summary judgment in First Amendment cases is to be treated more strictly. Vandenburg v. Newsweek, Inc., 441 F.2d 378, 380 (5th Cir.), cert. denied, 404 U.S. 864 (1971) ("Proof of such a mental state must usually be inferred from circumstances difficult to develop on motion for summary judgment"); Cochran v. Piedmont Publishing Co., 62 N.C.App. 548, 302 S.E.2d 903 (1983); Hall v. Piedmont Publishing Co., 46 N.C.App. 760, 266 S.E.2d 397 (1980) (actual malice

is not an appropriate issue for summary judgment). This Court has not yet decided the issue. See Wolston v. Reader's Digest Association, 443 U.S. 157, 161 n. 3 (1979). The North Carolina Court of Appeals follows the case law which imposes a stricter standard on First Amendment cases in summary judgment proceedings and has taken that reasoning one step further by holding that the punitive damages issue should go to the jury, even when the court does not know what the evidence will be at trial.

In order to reconcile this uncertainty and to prevent state courts from imposing more restrictions on the exercise of First Amendment freedoms as has the North Carolina Court, this Court should grant the defendants' petition for

certiorari. The North Carolina Court's action exposes not only newspapers but also public figures and private citizens, to an increased risk for speaking out and commenting on issues by requiring a jury to rule on virtually every punitive damage claim.

2. The Judgment Is In Conflict With Decisions of This Court

This Court historically has recognized the importance to our society of freedom of speech and freedom of the press as fundamental rights guaranteed by the United States Constitution. To protect those freedoms, this Court has established minimum constitutional levels of fault for speech below which states may not impose punitive liability. Gertz v. Robert Welch, Inc., 418 U.S. 323, (1974). The

Gertz Court held: "States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard of the truth." Id. at 349.

Although the North Carolina Court of Appeals recites Gertz as the standard, it misapplies this Court's ruling. The North Carolina Court of Appeals has ruled that plaintiff's case must go to the jury for a determination of whether he is entitled to recover punitive damages. The court based its ruling on one statement in plaintiff's deposition where plaintiff states that the statements under the picture are false. Plaintiff has failed, however, in response to defendants' motion for summary judgment, to come forward with any evidence which

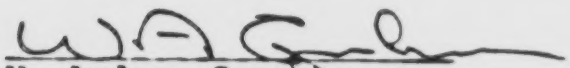
shows that defendants knew that the caption under the picture was false. The defendants came forward with evidence which shows that although the photographer may not have quoted the plaintiff exactly, he captured the essence of the conversation. Plaintiff failed to rebut defendant's evidence. Despite plaintiff's failure, the North Carolina Court of Appeals held that plaintiff came forward with sufficient evidence to entitle him to go to the jury. The evidence is insufficient constitutionally to require submission to a jury on the issue of punitive damages. The North Carolina Court of Appeals decision that the issue should be submitted to a jury merely because this is a First Amendment case is wrong.

When a publisher captures the essence of a conversation, the courts should not subject him to the punitive damages standard. The North Carolina Court of Appeals is requiring, essentially, that any reporter who publishes statements may be subject to punitive damages if he reports those statements with the use of synonyms. In requiring that a $5,000,000 punitive damage claim be submitted to a jury on such flimsy factual evidence as exists in this case, the North Carolina Court of Appeals has ignored legal precedent and has taken action that will undoubtedly have a chilling effect on the exercise of one of the most precious of our freedoms.

CONCLUSION

WHEREFORE, because there is a substantial and compelling question concerning a constitutional issue and because the courts are divided on the issue, this petitioner urges and requests that its petition for certiorari be allowed.

Respectfully submitted,



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APPENDIX

NORTH CAROLINA IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
ALEXANDER COUNTY 81 CVS 56

ED COCHRAN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER GRANTING PARTIAL SUMMARY JUDGMENT
	)	
PIEDMONT PUBLISHING COMPANY, INC., an affiliate of MEDIA GENERAL, INC., et al.,	)	Filed March 17, 1982
	)	
	)	
	)	
Defendants.	)	

THIS CAUSE coming on to be heard before the Honorable Robert A. Collier, Jr., Judge Presiding at the March 15, 1982, term of the Alexander County Superior Court upon the motions of the defendants for a summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, and, after considering

the pleadings in this action, together with the depositions and affidavit in support of defendants' motions, the briefs of both plaintiff and defendant, and after hearing oral arguments, and it appearing to the Court that there is no genuine issue as to any material fact concerning plaintiff's claim for punitive damages and that the defendants are entitled to a judgment as a matter of law on that claim;

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that summary judgment be and the same is hereby granted in favor of the defendants against the plaintiff on plaintiff's claim for punitive damages, and that the punitive damage claim is hereby dismissed.

This the 17 day of March, 1982.

S/ Robert A. Collier, Jr.
Honorable Robert A. Collier, Jr.
Judge Presiding, Alexander
County Superior Court

NO. 8221SC580
NORTH CAROLINA COURT OF APPEALS
Filed: 7 June 1983

ED COCHRAN

v.

PIEDMONT PUBLISHING COMPANY, INC., an affiliate of MEDIA GENERAL, INC.; and JOE GOODMAN; and RAY DOWNEY-LASKOWITZ, Individually, and in their respective capacities as the Publisher, City Editor, Managing Editor, and Photographer of the Winston-Salem Journal and Sentinel

Forsyth County
No. 82CVS1767

Initially Filed
in Alexander County
No. 81 CVS 56

Appeal by plaintiff from Collier, Judge. Judgment entered 17 March 1982 in Superior Court, Alexander County. Heard in the Court of Appeals 19 April 1983.

Plaintiff filed a complaint on 2 March 1981 alleging that defendants had libeled him, and requesting compensatory and punitive damages. Specifically, plaintiff alleged that on or about 8 November 1980 defendants had published, on the front page of the Winston-Salem Journal and Sentinel, a picture of plaintiff sitting on a bench with three other people. The printed caption beneath the picture read "Waiting for Godot. For these people, sitting on a bench on Marshall Street, much of life seems to be waiting. They are hungry, they say, and are waiting for some money to get something to satisfy their hunger. And tomorrow? That will be a day for more waiting."

Prior to trial defendants filed a motion for summary judgment. The trial court granted partial summary judgment in favor of defendants as to plaintiff's claim for punitive damages. From this partial summary judgment plaintiff immediately appealed.

Harbinson, Harbinson & Parker, by Joel C. Harbinson and Kimberly T. Harbinson, for plaintiff-appellant.

Womble, Carlyle, Sandridge & Rice, by Charles F. Vance, Jr., W. Andrew Copenhaver and M. Ann Anderson, for defendant-appellees.

EAGLES, Judge.

The lower court's ruling left for trial the issue of whether plaintiff is entitled to compensatory damages for libel. The sole issue presented on this

appeal is whether the trial court properly entered partial summary judgment in favor of defendant on plaintiff's claim for punitive damages. The record in this case indicates a factual dispute as to the content of the verbal exchange between the persons in the photograph and the defendants' photographer at the time the photograph was taken. Because of this factual dispute, the resolution of which would bear on the punitive damages issue, we must hold that the trial court improperly granted partial summary judgment in favor of defendant. We hold that the issue of punitive damages should be submitted to the jury.

Rule 56(c) of the North Carolina Rules of Civil Procedure provides that summary judgment shall be granted when the

"pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." In order to recover compensatory damages for libel, plaintiff must first establish that the caption beneath the photograph contained false information, Brown v. Boney, 41 N.C.App. 636, 255, S.E.2d 784 (1979), and that the false information was published through the fault or negligence of the defendant. Walters v. Sanford Herald, Inc., 31 N.C.App. 233, 228 S.E.2d 766 (1976). To recover punitive damages plaintiff, a private figure, faces the additional burden of proving "actual malice" on the part of the defendants, by showing

that the defendants published the libelous material with knowledge of its falsity or with reckless disregard for the truth. Gertz v. Robert Welch, Inc., 418 U.S. 323, 41 L.Ed.2d 789, 94 S.Ct. 2997 (1974); Taylor v. Greensboro News Co., 57 N.C.App. 426, 291 S.E.2d 852 (1982). The plaintiff may also show "actual malice" by establishing that the publication of libelous material was made with a high degree of awareness of probable falsity. Taylor v. Greensboro News Co., supra.

Whether defendnts published the picture and caption with "actual malice" is a fact material to the issue of punitive damages under the holding in Gertz. If a genuine issue exists as to that fact, summary judgment would be improper.

We hold that in the case sub judice the absence or presence of "actual malice" on the part of the defendants is a genuine issue as to a material fact. Plaintiff's deposition contained the statement: "That's false, what they've got under that picture. There's no such thing, there was nothing said like that. We didn't tell that photographer we were hungry." It would be possible for the jury to find for the plaintiff on the issue of punitive damages if plaintiff is able to prove at trial that the persons in the photograph did not tell the photographer that they were hungry and were waiting for money to enable them to go get something to eat.

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the carless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on public issues. [Citation omitted.] Emphasis added.]

Brown v. Boney, 41 N.C.App. at 648, 255 S.E.2d at 791, quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789, 805 (1974). "[M]edia defendants can[not] escape liability where the evidence discloses the publication of false factual statements under the guise of editorializing." Id.

Since there is a factual dispute between the parties and since summary judgment is not favored where proof of actual malice is required of the plaintiff, Hall v. Piedmont Publishing Co., 46 N.C.App. 760, 266 S.E.2d 397 (1980), we hold that the trial court improperly granted partial summary judgment in favor of the defendant on the issue of punitive damages.

Reversed.

Judges WELLS and BECTON concur.

No. 353P83 TWENTY-FIRST DISTRICT

SUPREME COURT OF NORTH CAROLINA

ED COCHRAN	)	
	)	
v.	)	
	)	
PIEDMONT PUBLISHING COMPANY, INC., an affiliate of MEDIA GENERAL, INC.; and JOE GOODMAN; and RAY DOWNEY-LASKOWITZ, Individually, and in their respective capacities as the Publisher, City Editor, Managing Editor, and Photographer of the Winston-Salem Journal and Sentinel	)	ORDER DENYING PETITION FOR DISCRETIONARY REVIEW (8221SC580)

Upon consideration of the Defendants' petition filed in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following

order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the
Court in conference, this
the 6th day of December, 1983.

s/ Frye, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 9th day of December 1983.

s/ J. Gregory Wallace

Clerk of the Supreme Court

Copy to:
North Carolina Court of Appeals
Womble Carlyle Sandridge & Rice,
Attorneys at Law
Harbison, Harbison & Parker,
Attorneys at Law

UNITED STATES CONSTITUTION

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

UNITED STATES CONSTITUTION

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. § 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

83-1459

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

PIEDMONT PUBLISHING COMPANY, INC., an affiliate of MEDIA GENERAL, INC., and JOE DOSTER, DUDLEY DALTON, JOE GOODMAN, and RAY DOWNEY-LASKOWITZ, Individually, and in their respective capacities as the Publisher, City Editor, Managing Editor, and Photographer of the Winston-Salem Journal and Sentinel,

Petitioners,

v.

ED COCHRAN,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

TO THE
NORTH CAROLINA COURT OF APPEALS

ED COCHRAN PRO SE
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Taylorsville, NC 28681
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QUESTION PRESENTED

Whether a state court can interpret its own procedural rules and deny defendants' request for summary judgment on the issue of punitive damages in an action for libel?

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TABLE OF AUTHORITIES

GROUNDS FOR JURISDICTION

The judgment by the North Carolina Supreme Court denying the petition for certiorari was entered on December 6, 1983. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

On or about November 7, 1980, plaintiff, Ed Cochran, while seated on a public bench with some acquaintances, was photographed by an employee of the Winston-Salem Journal and Sentinel. After taking the picture, the photographer, Mr. Raymond Downey-Laskowitz, approached plaintiff and the others seated on the bench and asked for their names. All the individuals refused to give their names, and plaintiff contends that he asked the photographer not to print the photograph. Plaintiff alleges that the photographer then stated that the photo would be printed and that plaintiff did not have the money to hire a lawyer to sue for damages. Defendant contends

that he merely walked away after stating that no one's name would be printed.

The day after this incident plaintiff's picture appeared on the front page of the second edition of the Winston-Salem Journal and Sentinel with the following caption, "Waiting for Godot". Plaintiff immediately became very upset and personally requested that the City Editor of the paper, Mr. Dudley Dalton, print an apology or a retraction. The paper refused to print any retraction contending that the caption was not defamatory. Plaintiff, by his attorney, then forwarded a written request for retraction on December 18, 1980.

When the paper refused to print the requested retraction, the plaintiff

filed a complaint for defamation of character on March 2, 1981. The complaint alleged that the caption printed on November 8, 1980 was wholly false, untrue and misleading and that the publication was made with malice in that defendant failed to investigate prior to printing and published the article with reckless disregard for its truth or falsity. Plaintiff's complaint sought general, special and punitive damages.

On or about April 6, 1981 defendants answered the complaint. They denied the material allegations and alleged by way of defense that the statements were true and that the photograph was a fair representation. They also alleged that they acted without

malice, that the photograph and caption were privileged, and that the State and United States Constitutions protected their right to publish the article.

On March 3, 1982 defendant filed a motion for Summary Judgment. On March 17, 1982 the trial court granted partial summary judgment for defendant on the issue of punitive damages. Plaintiff appealed from this order. The North Carolina Court of Appeals unanimously reversed the trial court's grant of summary judgment on the punitive damages claim. The North Carolina Supreme Court denied defendants' petition for certiorari.

REASONS WHY THE WRIT SHOULD NOT ISSUE

Prior to 1964, newspapers, radio, and television broadcasters, in performing the function of dispensing news, enjoyed no privilege which could not be claimed by the general public. State law defined the extent of liability of the media in actions for libel and slander. 50 Am. Jur. 2d, Libel and Slander, §251, at p. 769 (1970). In 1964, in a landmark decision, the United States Supreme Court held that the First Amendment guarantees of freedom of speech and press do limit the application of state libel law. New York Times Co. v. Sullivan, 376 U.S. 254 (1964). The New York Times case established the so-called "actual malice" rule, under which public figures and public officials

may not recover damages for libel without proving that the alleged defamatory statement was made by the defendant either with knowledge of its falsity or with reckless disregard of whether the statement was true or false. The underlying basis for the rule was that a fear of libel suits produced self-censorship and, therefore, had a "chilling effect" on discussion of issues of public concern. Id. at 277-80.

In 1974, the court was required to decide whether the New York Times standard should be applied in the case of a private individual who had been libelled by the press. In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the court held that, "so long as they do not impose liability without fault, the States may de-

fine for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Id., at 346-7.

The main thrust of the Gertz decision was its holding that, if the plaintiff qualifies as a "private individual", he may recover actual damages for libel upon proof that a publication was false and was published negligently. He is not required to prove actual malice unless he seeks to recover punitive damages.

Although punitive damages awards in libel actions against the press were not the court's primary focus in Gertz, the opinion further defined the law on this issue. In addition to prohibiting

state laws which would permit a presumption of damages and actual malice in certain cases classified as "libel per se", the court held that no plaintiff, whether a private individual, public figure or public official, could recover punitive damages when liability is not "based on a showing of knowledge of falsity or reckless disregard for the truth." Id., at 349.

It must be emphasized that, within the Gertz definition, a state is constitutionally permitted to allow the award of punitive damages against the press when the "actual malice test" is met. Id., at 348-50. The holding merely precludes application of the common law of defamation to the extent that it per-

mits a presumption of injury or malice from the fact of publication of certain classes of statements, eg., statements imputing commission of a crime, statements deprecating a person in his job or profession, and statements implying "unchastity." See Arnold v. Sharpe, 37 N.C. App. 506, 246 S.E.2d 556 (1978); 8 Strong's N. C. Index 3d, Libel and Slander, §5, pp. 338-40 (1977).

Since Gertz, the majority of the lower federal courts have held that, when the actual malice test of the New York Times case has been satisfied, punitive damages are permitted even if the individual is a public figure or public official. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir.

1976); Davis v. Schuchat, 510 F.2d 731 (D.C. Cir. 1975); Goldwater v. Ginzburg, 414 F.2d 324 (2nd Cir. 1969); Maheu v. Hughes Tool Co., 569 F.2d 459 (9th Cir. 1977); Bucky v. Littel, 539 F.2d 882 (2nd Cir. 1976); Carson v. Allied News Co., 529 F.2d 206 (7th Cir. 1976); Jenoff v. Hearst Corp., 453 F.Supp. 541 (C.D.Md. 1978).

To plaintiff's knowledge the only cases holding that punitive damages are not allowed upon proof of actual malice were either reversed, Maheu v. Hughes Tool Co., 384 F. Supp. 166 (C.D.Cal. 1974), rev'd 569 F.2d 459 (9th Cir. 1977), or were decided in jurisdictions which generally prohibit the recovery of punitive damages at common law. Taskett v. King

Broadcasting Co., 86 Wash. 2d 439, 546, P.2d 81 (1976); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E. 2d 161 (1975).

In a 1976 case, which was appealed from the Western District of North Carolina, the 4th Circuit Court of Appeals held that punitive damages may be allowed in a libel case even though a public figure is involved. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976). In Appleyard Overdrive, a trucker's magazine published articles accusing a public figure of diverting funds to personal use. The court upheld an award of $5,000 in punitive damages on the ground that "awards of punitive damages advance a valid state

goal. Such awards serve to deter others who might engage in malicious false attacks on public figures." Id, at 1030. In discussing the Gertz decision the Court interpreted the Supreme Court's holding as only "removing the spectors of presumed and punitive damages in the absence of New York Times malice." Id., at 1029.

North Carolina has traditionally permitted recovery of punitive damages in libel actions where the plaintiff proves actual malice or that the defamation was recklessly or carelessly published. 8 Strong's, N. C. Index 3d, Libel and Slander, §18, p. 360 (1977); Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940); Stewart v. Nationwide Check Corp., 279 N.C. 278, 182 S.E.2d

410 (1971). Although, to plaintiff's knowledge, there have been no North Carolina decisions on the issue of punitive damages and the press since the New York Times decision, plaintiff appellant asserts that the issue should be decided in accordance with previous 4th Circuit opinions and North Carolina common law. As the court stated in Appleyard, "[t]he purpose of constitutional limitation on the permissible scope of state law libel is not to protect false statements of fact. Rather the purpose of the New York Times rule is to prevent "would be" critics of official conduct [from being[deterred from voicing their criticism . . . because of doubt whether it can be proved in court or fear of the

expense of having to do so." Appleyard v. Transamerican Press, Inc., 539 F.2d 1026, 1030 (4th Cir. 1976), cert. den. 429 U.S. 1041 (1977).

Clearly there is no constitutional prohibition which would prevent the award of punitive damages against a newspaper as long as malice is shown. The Supreme Court has left this issue to the discretion of the state courts. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347 (1974). North Carolina law indicates that the courts of this state will award punitive damages in a libel suit upon a showing of malice or proof that the defamation was recklessly or carelessly published. Roth v. Greensboro News Co., 217 N.C. 13, 6 S.E.2d 882 (1940); Stewart

v. Nation-Wide Check Corp., 279 N.C. 279 N.C. 278, 182 S.E.2d 410 (1971). This is also the clear trend among lower federal courts, including those of the 4th Circuit. Appleyard v. Transamerican Press, Inc., 539 F.2d 1026 (4th Cir. 1976); Jenoff v. Hearst Corporation, 453 F. Supp. 541 (D.Md. 1978).

Respondent contends that sufficient evidence of malice was presented at the hearing of defendant's motion for a jury to consider its existence. Because the evidence must be taken in the light most favorable to the plaintiff, and because defendant, in a motion for summary judgment, has the burden of proving that no genuine issue of material fact exists, the evidence in this

case was sufficient to withstand said motion.

Accordingly, this Court should deny petitioners' writ for certiorari.

CONCLUSION

For the foregoing reasons, the Respondent submits that the Petitioners' petition for writ of certiorari should be denied.

Respectfully submitted,

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